Supreme Court, U.S.
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No. 01-9094

IN THE

Supreme Court of the United States

Abu-Ali Abdur'Rahman,
Petitioner,

v.

Ricky Bell, Warden,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals for the Sixth Circuit

SUPPLEMENTAL BRIEF OF PETITIONER ABU-ALI ABDUR'RAHMAN

Bradley MacLean
Stites & Harbison PLLC
Suntrust Center, Suite 1800
424 Church St.
Nashville, TN 37219

Thomas C. Goldstein
Counsel of Record
Amy Howe
Goldstein & Howe, P.C.
4607 Asbury Pl., N.W.
Washington, DC 20016
(202) 237-7543

Of Counsel:
James S. Liebman
435 W. 116th St., Box B-16
New York, NY 10027

William P. Redick, Jr.
P.O. Box 187
Whites Creek, TN 37189

October 31, 2002

CAPITAL CASE

SUPPLEMENTAL QUESTIONS PRESENTED

1. Did the Sixth Circuit have jurisdiction to review the district court's order, dated November 27, 2001, transferring petitioner's Rule 60(b) Motion to the Sixth Circuit pursuant to 28 U.S.C. § 1631?

2. Did this Court have jurisdiction to review the Sixth Circuit's order, dated February 11, 2002, denying leave to file a second habeas corpus petition?

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STATUTES INVOLVED

This brief involves 28 U.S.C. §§ 1254(1), 1291, 1631, 2253, and 2244(b)(3), which are set forth in Appendix A.

STATEMENT OF RELEVANT PROCEEDINGS

The federal district court in this habeas corpus proceeding held that it could not reach the merits of petitioner's Due Process claims of egregious prosecutorial misconduct because petitioner had failed to ask the Tennessee Supreme Court for leave to "appeal by permission" from an adverse decision on those claims by the Tennessee Court of Criminal Appeals. Although the granting of permission to appeal was discretionary with Tennessee's highest court, the federal district judge concluded that a request for such permission was a state remedy that had to be exhausted in order to preserve petitioner's Due Process contentions for federal habeas review.

As petitioner was preparing his brief on the habeas appeal (filed Aug. 4, 1999), this Court decided *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999). *O'Sullivan* held that unless state law clearly says otherwise, discretionary review is part of the state's "ordinary" appellate process and must be exhausted. *Id.* at 847.

The Sixth Circuit denied all habeas relief on September 13, 2000, and stayed its mandate pending certiorari proceedings. JA 21, 134. During those proceedings, the Tennessee Supreme Court issued Tenn. S. Ct. R. 39, "clarify[ing]" that discretionary review in that court had not been part of the state's "routine[]" appellate process at any time since July 1, 1967, when the Tennessee Court of Criminal Appeals was created. JA 163.

This Court denied certiorari on October 9, 2001. Later that day, petitioner asked the district court for an expedited status conference, which was held the next day. At the conference, petitioner orally moved for Rule 60(b) relief from the court's judgment, contending that the judgment had been premised on a misunderstanding of state law that Rule 39 dispelled. In argument, the court was informed of the established practice allowing it to signify its disposition to grant the Rule 60(b)

motion, if indeed it was so inclined, and thereby obtain a remand of the pending appeal for that purpose. The court asked for briefing on the question whether petitioner's 60(b) motion was "successive." 10/10/01 Tr. 2-4, 12-15, 25.[1]

That same day, October 10, 2001, petitioner moved the Sixth Circuit to withhold its mandate in the pending appeal (Nos. 98-6568/9) and to "remand to the district court" to determine whether, as he claimed, Rule 39 made "clear that [its non-exhaustion] conclusion was erroneous." JA 152, 154-56 & n.12 (noting Rule 60(b) proceedings in district court). The court of appeals ordered the state to respond and withheld its mandate until it denied the motion on February 11, 2002. JA 23, 27.

On November 27, 2001, the district court decided under *McQueen v. Scroggy*, 99 F.3d 1302 (6th Cir. 1996), that a "60(b) Motion must be construed as . . . a successive petition." Because that decision triggered 28 U.S.C. § 2244(b)(3)(A), which deprives district courts of first-instance jurisdiction over "a second or successive application," the court transferred the case to the court of appeals. JA 42 (citing 28 U.S.C. § 1631).

The court of appeals docketed the transferred case as "an application for permission to file a successive petition," assigning it No. 01-6487. Petitioner immediately informed the court of appeals that: *(1)* he "*has not* filed an application for a . . . successive petition" (original emphasis) and "never intended" to file one or have his 60(b) motion "converted into" one; *(2)* he therefore doubted whether the appellate court had jurisdiction under § 2244(b)(3)(A), which requires an "applicant [to] move . . . for an order authorizing" a "second or successive application"; *(3)* he therefore had filed an appeal—docketed as No. 01-6504—challenging the district court's decision that the 60(b) motion was "successive," but "*not* appealing" the lower court's further order transferring a "successive petition"—in which he had no interest; and *(4)* the Rule 39 issue could also "appropriately be addressed by

[1] Petitioner filed his written 60(b) motion and brief on Nov. 2, 2001.

granting Petitioner's motion in Nos. 98-6568/9 to withhold the mandate and to remand the case." 12/1/01 Letter to Sixth Circuit Clerk 2-3;12/6/01 Mot. to Hold [No. 01-6487] in Abeyance 1-2; 12/5/01 Applic. for Certif. of Appealability 13; 12/20/01 Reply to Resp. 1-3.

In a January 18, 2002 order denying petitioner's request for a certificate of appealability in the 60(b) appeal (No. 01-6504), the Sixth Circuit panel affirmed the district court's decision that "a Rule 60(b) motion is the equivalent of a successive petition." That ruling made it "proper[]" to go on in the "transferred" case to consider "whether the Rule 60(b) motion satisfied the gateway criteria of § 2244(b)." JA 36.

In a final order in all three cases on February 11, 2002,[2] the court denied the motion to remand and issued its mandate in the original appeal (Nos. 98-6568/9); dismissed the 60(b) appeal (01-6504) on the basis of its January 18 ruling that the 60(b) motion was "successive," triggering the court's authority under § 2244(b)(3)(A); and denied leave (not requested by petitioner) to file a successive application (01-6487). JA 39.

On March 19, 2002, petitioner asked this Court for both a writ of certiorari (01-9094) and an original writ of habeas corpus (01-9095) to review the court of appeals' January 18 and February 11 decisions affirming the district court's ruling that his 60(b) motion was "successive." Petitioner sought review of this ruling in the 60(b) appeal (No. 01-6504) and also in the transferred case (No. 01-6487) to the extent that the latter was the locus of the same ruling. Petitioner emphasized that he "*does not seek review of the Sixth Circuit's gatekeeping ruling denying him 'authorization' to file a 'second or successive' application.*" He also asked the Court to review the denial of his motion to remand the original appeal (Nos. 98-6568/9). Cert. Pet. vi, 1 & n.1, 9-12 & n.5; Cert. Rep. 2-3; Habeas Pet. i.

The Court granted petitioner's application for a stay of execution and denied his original habeas petition on April 8,

[2] The Joint Appendix (at 38) contains a typographical error: it omits docket no. 01-6487 from the matters in which the order was entered.

2002. On April 22, 2002, the Court granted certiorari on two issues: Did the lower courts correctly rule that the 60(b) motion was per se successive? Did the court of appeals correctly deny the motion to remand the Rule 39 issue to the district court?

I. THE SIXTH CIRCUIT HAD JURISDICTION.

A. The question of the Sixth Circuit's jurisdiction to review the district court's order of November 27 is like the jurisdictional question decided in *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998). There the Court recognized that jurisdiction turned upon a proper categorization of the nature of the proceeding, and that the categorization question coincided with the main issue in dispute between the parties on the merits. Here petitioner's submission on the merits is that his Rule 60(b) motion *was* a permissible Rule 60(b) motion, not a "second or successive habeas corpus application" requiring authorization by the court of appeals before it could be filed in the district court under 28 U.S.C. § 2244(b). Respondent's submission is that the motion was a second habeas application. The district court accepted respondent's categorization and therefore rejected the motion, and transferred the case to the court of appeals under 28 U.S.C. § 1631. If this ruling was wrong, the court of appeals had jurisdiction to review it under 28 U.S.C. §§ 1291 and 2253.

Rulings finally disposing of motions made under Fed. R. Civ. P. 60(b) are "final decisions" appealable under § 1291. *See* Moore's Federal Practice 3d – Civil §60.68[1]. In habeas cases they are "final order[s]" appealable under § 2253. *See, e.g., Dunlap v. Litscher*, 301 F.3d 873, 875 (7th Cir. 2002) (court of appeals "consolidated for decision three appeals from denial or dismissal of motions under Rule 60(b) . . . that present similar questions about the circumstances in which prisoners subject to . . . [AEDPA] may file motions under Rule 60(b)"). Specifically, a district court's holding that a Rule 60(b) motion or other filing constitutes a successor habeas petition is an appealable order. *See Slack v. McDaniel*, 529 U.S. 473 (2000) (determination by district court that habeas claims were

"second or successive" was reviewed on appeal by the Ninth Circuit, then by this Court on certiorari); *Garrett v. United States*, 178 F.3d 940 (7th Cir. 1999) (reversing the district court's finding that a § 2255 motion was successive); *Graham v. Johnson*, 168 F.3d 762, 774-75 (5th Cir. 1999) (holding that dismissal for failure to seek court of appeals' authorization to file successor petition is an appealable final order when a habeas petitioner challenges the applicability of § 2244(b) to the petition); *McQueen*, 99 F.3d at 1334-35 (reviewing and affirming the denial of a Rule 60(b) motion filed during the pendency of appeal, when the district court found that the motion constituted a successor petition and an abuse of the writ).

Although (as in *McQueen*) petitioner's original habeas appeal was pending when he filed his 60(b) motion, that did not deprive the district court of jurisdiction to consider the motion. This Court has recognized that "the pendency of an appeal does not affect the district court's power to grant Rule 60 relief." *Stone v. INS*, 514 U.S. 386, 401 (1995).[3]

> The modern view is that a pending appeal does not preclude a district court from entertaining a Rule 60(b) motion. . . . [A] litigant may file a Rule 60(b) motion in the district court despite a pending appeal; the district court may entertain the motion; it may deny the motion on the merits; and if the district court is inclined to grant the motion, the district court or the movant may inform the court of appeals. The appellate court may then remand the matter to the district court for the purpose of granting the motion.

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[3] The Court has similarly held that if a motion for a new trial is filed under Federal Criminal Rule 33 while the direct appeal is pending, the district court has "jurisdiction to entertain the motion and either deny the motion on its merits, or certify its intention to grant the motion to the Court of Appeals, which could then entertain a motion to remand the case." *United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984).

Moore's Federal Practice 3d – Civil §60.67[2][b].[4] Under this now-standard procedure (called a "motion for a *Hirsch* remand" in Sixth Circuit parlance, referring to *First National Bank of Salem v. Hirsch*, 535 F.2d 343 (6th Cir. 1976)), a district court has jurisdiction to consider and reject a Rule 60(b) motion without any sort of leave or remand from the court of appeals despite the pendency of an appeal.[5] And when it does, its "order is appealable as a separate final order, and if the original appeal is still pending, it would seem that the court of appeals can consolidate the proceedings." *Stone*, 514 U.S. at 401.

Equally clearly, the fact that the district court's decision barring petitioner's Rule 60(b) motion as a successor habeas petition within § 2244(b)(3)(A) took the form of an order transferring the motion to the court of appeals made it no less a "final order" appealable under 28 U.S.C. § 2253. Because petitioner never did or could assert any claim that he was eligible for authorization to file a successor petition, the district court's ruling dispatching him to the court of appeals for such authorization was a final order in the classic definition of that term: it "terminate[d] the litigation on the merits of the case, and . . . [left] nothing to be done but to enforce by execution what ha[d] been determined." *Express Companies' Cases*, 108

[4] Only the Ninth Circuit uses a different procedure. This is described and criticized in Moore's Federal Practice 3d – Civil §60.67[2][c].

[5] *See id.* nn.4, 5 (collecting cases). Although the Sixth Circuit gives its district judges discretion to decline to consider a motion for a *Hirsch* remand (see *SEC v. Johnston*, 143 F.3d 260 (6th Cir. 1998)), it reviews district court decisions that do consider such motions (*see, e.g.*, *Good v. Ohio Edison Co.*, 149 F.3d 413, 417 (6th Cir. 1998); *Begala v. PNC Bank*, 214 F.3d 776 (6th Cir. 2000)), treating "[a] denial of a *Hirsch* remand . . . [motion as] essentially a denial of a motion under Fed. R. Civ. P. 60(b)" (*Bovee v. Coopers & Lybrand C.P.A.*, 272 F.3d 356, 361 (6th Cir. 2001)). Notably, the very case relied upon by the district court and the Sixth Circuit as the basis for characterizing petitioner's 60(b) motion as a successor habeas application, *McQueen v. Scroggy*, implicitly recognized the jurisdiction of the district court to consider and deny a Rule 60(b) motion despite the pendency of an appeal, and of the court of appeals to hear an appeal from that decision.

U.S. 24, 28 (1883). While transfer orders that merely shift the venue in which a party may obtain the relief he seeks are generally not appealable, transfer orders that effectively bar a party from receiving relief in any forum are subject to immediate appeal. *Compare Goble v. Marsh*, 684 F.2d 12, 14 (D.C. Cir. 1982) (transfer order is appealable when rights may be irreparably lost in the absence of immediate review) *with Ukiah Adventist Hosp. v. FTC*, 981 F.2d 543, 546 (D.C. Cir. 1992) (transfer orders under 28 U.S.C. § 1631 are properly viewed as nonappealable interlocutory orders when "the very purpose of the transfer . . . is to allow the case to continue, rather than terminating it"). Here, the transfer order did not simply change the forum for adjudication of petitioner's claims; it completely foreclosed any consideration of those claims. Thus, the order was final for purposes of the pertinent appeal statutes, §§ 1291 and 2253.

B. In addition to the Sixth Circuit's jurisdiction to review the district court's November 27, 2001 order under 28 U.S.C. §§ 1291 and 2253, the circuit court also plainly had two other sources of jurisdiction to decide the issues on which this Court has granted *certiorari*:

1. In *In re Sims*, 111 F.3d 45 (6th Cir. 1997), the Sixth Circuit approved a practice under which a district court, when presented with a post-AEDPA filing that the district court deems to be a second or successive collateral-attack application which has not been authorized by the court of appeals pursuant to 28 U.S.C. § 2244(b)(3), may transfer the filing to the court of appeals under 28 U.S.C. § 1631, so that the court of appeals can consider whether to grant authorization. The *Sims* procedure, like similar practices adopted in other circuits,[6] is designed to

[6] *See, e.g.*, *Boyd v. United States*, 304 F.3d 813, 814 (8th Cir. 2002): "[W]e encourage district courts, in dealing with purported Rule 60(b) motions following the dismissal of habeas petitions, to employ a procedure whereby the district court files the purported Rule 60(b) motion and then conducts a brief initial inquiry to determine whether the allegations in the Rule 60(b) motion in fact amount to a second or successive collateral attack under either 28 U.S.C. § 2255 or § 2254. If the district court determines the Rule 60(b)

provide a consistent, efficient method of routing to the courts of appeals what appear to district judges to be successor post-conviction pleadings that require "gatekeeper" screening. But, of course, the district judges may sometimes be wrong in regarding a particular pleading as "second or successive"; and, if they are, the court of appeals is obliged to so hold and refuse to accept the transfer. *Graham v. Costello*, 299 F.3d 129, 132 (2d Cir. 2002) (following transfer of a habeas petition to the court of appeals, the court explains that "[b]efore addressing whether Graham's present habeas petition warrants our authorization, we must first be certain that authorization is required because his current petition is a 'second or successive' application under 28 U.S.C. § 2244"); *Martinez-Villareal v. Stewart*, 118 F.3d 628 (9th Cir. 1997) (when an inmate was compelled to resort to the court of appeals for permission to file a habeas petition as result of the district court's erroneous interpretation of § 2244, the court finds that § 2244's gatekeeping provisions do not apply and that a motion for authorization is unnecessary; it thus remands to district court for consideration of the merits of petitioner's claim).[7] This is simply an instance of the axiomatic proposition that "[a] federal court always has jurisdiction to decide whether it has

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motion is actually a second or successive habeas petition, the district court should dismiss it for failure to obtain authorization from the Court of Appeals or, in its discretion, may transfer the purported Rule 60(b) motion to the Court of Appeals. Depending on which course of action the district court chooses, the petitioner may either appeal the dismissal of the purported Rule 60(b) motion or, if the district court has elected to transfer the purported 60(b) motion to the Court of Appeals, await the action of the Court of Appeals."

[7] *See also, e.g., Haro-Arteaga v. United States*, 199 F.3d 1195 (10th Cir. 1999) (after receiving transfer from district court, court of appeals rules that district court erred in finding that it lacked jurisdiction to consider a § 2255 motion and remands for merits review); *Raineri v. United States*, 233 F.3d 96 (1st Cir. 2000) (court of appeals, following transfer of a § 2255 case to it, holds that district court erred in concluding that the § 2255 motion was governed by successive-petition provisions; it vacates the transfer order, reverses the order of dismissal, and remands the case to the district court).

jurisdiction and, if it decides that it does not, to take appropriate action." Hart & Wechsler's The Federal Courts and the Federal System 1580-81 (4th ed. 1996). In the *Martinez-Villareal* case, *supra*, this Court upheld its own jurisdiction on the premise that the Ninth Circuit court of appeals had jurisdiction to decide precisely this threshold question *whether* a post-conviction filing was or was not "second or successive" so as to need gatekeeper authorization under § 2244(b)(3)(A). 523 U.S. at 641-42. So, in the present case, the Sixth Circuit—when it received petitioner's case transferred from the district court and was confronted with petitioner's objection that the district court had incorrectly held his 60(b) motion subject to § 2244(b)—had the jurisdiction and the obligation to decide whether the district judge or petitioner was right.[8]

2. Petitioner not only filed a 60(b) motion in the district court but also filed a motion in the court of appeals—while his original appeal was still pending in that court following this Court's denial of *certiorari*—asking the court of appeals to withhold its mandate and remand the case to the district court for consideration of the issues presented by the 60(b) motion. Uncontestably, the court of appeals had jurisdiction over the motion filed with it. *See, e.g., Bartone v. United States*, 375 U.S. 52 (1963) (per curiam). And its consideration of the merits of the request for a remand was constrained by AEDPA only if what petitioner was seeking was tantamount to a second or successive petition within § 2244(b), *see Calderon v. Thompson*, 523 U.S. 538 (1998)—the nub of the pair of questions on which this Court has granted *certiorari*.

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[8] As the court of appeals itself rightly recognized in its January 18, 2002 order (JA 36), it was obliged to determine *de novo* whether the transferred motion was, in the words of Section 2244(b)(3)(A), a "second or successive application" before it could take *jurisdiction* of the transferred action. Had it ruled that the action was not second or successive, it would have had either to grant the petitioner's pending motion to remand and send the action back to the district court, *see supra* at 7 & n.6 (collecting cases), or to dismiss and invite the petitioner to refile in the district court, *see, e.g., Banks v. United States*, 167 F.3d 1082, 1083 (7th Cir. 1999).

II. THIS COURT HAS JURISDICTION.

Because, as we saw, the Sixth Circuit had jurisdiction to determine whether petitioner's motions to the district court and to it were "second or successive habeas corpus application[s]" within the meaning of 28 U.S.C. § 2244(b), petitioner's case presenting those questions was "in" the court of appeals for purposes of this Court's jurisdiction under § 1254.

To be sure, Congress has denied this Court jurisdiction to review a court of appeals' "grant or denial of an authorization . . . to file a second or successive application" for habeas corpus. 28 U.S.C. § 2244(b)(3)(E). But petitioner sought no such authorization from the court of appeals, and he is not asking this Court to review any question having to do with whether, *if his Rule 60(b) motion in the district court and his remand motion in the court of appeals were "second or successive habeas corpus application[s],"* they would qualify for authorization under the criteria of 28 U.S.C. § 2244(b). To the contrary, petitioner seeks this Court's review only of the question *whether* his motions *are* "second or successive habeas corpus application[s]." The Court's jurisdiction to decide that anterior question has been settled by *Slack v. McDaniel* (which was "in" the court of appeals on appeal from a district court order dismissing a habeas corpus petition on the theory—held erroneous by this Court—that it was a successor petition) and by *Stewart v. Martinez-Villareal* (which was "in" the court of appeals by virtue of the court of appeals' consideration whether to transfer back to the district court a petition routed to it on a similar theory—similarly held erroneous by this Court).

CONCLUSION

The court of appeals had jurisdiction and this Court has jurisdiction to determine the issues on which *certiorari* was granted.

Respectfully submitted,

Bradley MacLean
Stites & Harbison PLLC
Suntrust Center, Suite 1800
424 Church St.
Nashville, TN 37219

Of Counsel:
James S. Liebman
435 W. 116th St., Box B-16
New York, NY 10027

Thomas C. Goldstein
Counsel of Record
Amy Howe
Goldstein & Howe, P.C.
4607 Asbury Pl., N.W.
Washington, DC 20016
(202) 237-7543

William P. Redick, Jr.
P.O. Box 187
Whites Creek, TN 37189

October 31, 2002

APPENDIX A

Relevant Sections of the United States Code:

28 U.S.C. § 1254(1) (2002)
§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 U.S.C. § 1291 (2002)
§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title [28 USCS §§ 1292(c), (d), 1295].

28 U.S.C. § 1631 (2002)
§ 1631. Transfer to cure want of jurisdiction

Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal

could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

28 U.S.C. § 2244(b)(3) (2002)
§ 2244. Finality of determination

* * * *

(b) (3) (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.
(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.
(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.
(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.
(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

28 USCS § 2253 (2002)
§ 2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in

which the proceeding is held.
(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.
(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--
(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
(B) the final order in a proceeding under section 2255.
(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).